

C O P Y

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1828

H. D. GROSS dba VALLEY
ROCK AND SAND CORPORATION

Appellant,

vs.

PEOPLE OF THE STATE OF
CALIFORNIA,

Appellee.

On Appeal From the Appellate
Department, Superior Court
of California, County of
Riverside

MOTION OF APPELLEE
TO DISMISS APPEAL

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Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL

Appellee moves that the appeal
herein taken be dismissed on the ground
that said appeal does not present a
substantial federal question.

I

THE STATE STATUTE INVOLVED
AND THE NATURE OF THE CASE

A

THE STATUTE

This appeal raises the validity of
certain provisions of the California

Water Code, as follows:

Water Code Section 13260.

- (a) "Any person discharging waste or proposing to discharge waste within any region that could affect the quality of the waters of the state other than into a community sewer system, and any person who is a citizen, domiciliary, or political agency or entity of this state discharging waste or proposing to discharge waste outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region, shall file with the regional board of that region a report of that discharge, containing such information as may be required by the board. No report need be filed when such

requirement is waived pursuant to Section 13269.

- (b) Every such person discharging waste shall file with the regional board of that region a report of any material change or proposed change or proposed change in the character, location, or volume of the discharge.
- (c) Each report under this section shall be sworn to or submitted under penalty of perjury.
- (d) Each report under this section shall be accompanied by a filing fee of not to exceed One Thousand Dollars (\$1,000) according to a reasonable fee schedule established by the state board.
- (e) When a report filed by any person pursuant to this section is not adequate in the judgment of

the regional board, the board may require such person to supply such additional information as it deems necessary."

Water Code Section 13050.

- (d) "'Waste' includes sewage and any and all other waste substances, liquid, solid, gaseous or radio-active, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature, including such waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Water Code Section 13261.

"Any person failing to furnish a report under Section 13260 when so requested by a

regional board is guilty of a misdemeanor."

These sections are a part of the Porter-Cologne Water Quality Control Act (Water Code sections 13020 through 13983 inclusive) which establishes water quality control boards and each regional board being the principle state agency with prior responsibility for the coordination and control of water quality. See People ex rel. Evelle J. Younger v. F. E. Crites, Inc., 51 Cal.App.3d 961, 963 (1975) and Morshead v. California Regional Water, 45 Cal.App.3d 442 (1975) footnote 2, involving injunctive relief rather than criminal prosecution for violations of the Porter-Cologne Water Quality Control Act. No published appellate decision has been found which passes upon the constitutionality of the instant section 13260(a) of the California Water Code, a misdemeanor.

B

THE PROCEEDINGS BELOW

Appellant was charged by a written complaint in the Municipal Court with a violation of Section 13260(a) of the California Water Code, a misdemeanor, in that he did wilfully and unlawfully fail to properly file a report of waste discharge, at the request of the California Regional Water Quality Control Board and in that he did wilfully and unlawfully violate section 13260(d) of the California Water Code by failing to accompany with the report a filing fee of not to exceed One Thousand Dollars (\$1,000).

Prior to the commencement of criminal proceedings, the Regional Water Quality Control Board informed appellant by letter, which letter was in fact received by appellant, that his operation constituted a waste

discharge and if the report of waste discharge was not submitted within seventeen days from the date of the letter, criminal proceedings would be instituted.

Appellant filed a demurrer to the aforementioned complaint pursuant to California Penal Code section 1004(4) alleging, inter alia, "Section 13261 of the California Water Code violates the due process clause of the 14th Amendment to the United States Constitution in that it fails to define the crime which the defendant is accused of committing with sufficient certainty, and as such does not state a public offense, and is therefore void and unenforceable, and subject to demurrer." Said demurrer was overruled by the Municipal Court.

Appellant was convicted in a jury trial of the charge. Upon appeal, the Appellate Department of the Superior

Court of the State of California, County of Riverside, affirmed the judgment of conviction and pursuant to Rule 63 of the California Rules of Court certified the matter to the District Court of Appeal, Fourth Appellate District, Division Two. The District Court of Appeal denied the transfer of appeal from the Appellate Department of the Superior Court. A petition for a Writ of Mandate filed in the Supreme Court of the State of California to compel the District Court of Appeal to transfer the appeal from the Appellate Department of the Superior Court was denied.

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL
QUESTION NOT PREVIOUSLY DECIDED
BY THIS COURT

Appellant alleges, the instant Water Code section "violates the Constitution of the United States" on six different grounds. Each of these will be separately

discussed.

A

THE SECTION DOES NOT ESTABLISH A
VOID DELEGATION OF JUDICIAL POWER
TO AN ADMINISTRATIVE AGENCY

Since the decisions of Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 and Panama Refining Co. v. Ryan (1935) 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 466, this Court has rarely invalidated a statute based upon a void delegation of judicial power to an administrative agency.

As Justices Marshall and Brennan pointed out in their dissents in National Cable Television v. United States, 415 U.S. 336, 353-354, 39 L.Ed.2d 370, 94 S.Ct. 1146 (1974):

"The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the

court for all practical purposes. It is hardly surprising that, until today's decision, the court had not relied upon Schecter Poultry Corp. v. United States, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837 (1935), almost since the day it was decided."

Here California Water Code Section 13260 lays out specific guidelines for the regional board to follow. 'Waste' is clearly defined in California Water Code Section 13050(d).

In conclusion, there has been no showing of a void delegation of judicial power to the Regional Water Quality Control Boards.

B

THE SECTION DOES NOT DELEGATE
UNBRIDLED DISCRETION TO AN
ADMINISTRATIVE AGENCY TO
DETERMINE ITS OWN JURISDICTION

As indicated in the prior discussion

the Porter-Cologne Water Quality Control Act (Water Code Sections 13020 through 13983 inclusive) establishes the Water Quality Control Boards in the State of California. Section 13260(a) of the Water Code clearly indicates under what circumstances reports must be filed with the regional board. The jurisdiction is thus defined by the statutes, not determined by the regional board.

C

THE SECTION IS NOT VOID FOR
FAILURE TO PROVIDE TIMELY
AND ADEQUATE NOTICE OF A
DETERMINATION THAT A PERSON
IS SUBJECT TO ITS PROVISIONS

Water Code Section 13261 makes the failure to furnish a report when so requested by a regional board a misdemeanor.

California Water Code Section 13265 provides: "Any person discharging waste in violation of Section 13264, after such

violation has been called to his attention in writing by the Regional Board, is guilty of a misdemeanor. Each day of such discharge shall constitute a separate offense."

California Water Code Section 13263 provides:

- (a) The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change therein, except discharges into a community sewer system, with relation to the conditions existing from time to time in the disposal area or receiving waters upon or into which the discharge is made or proposed. The requirements shall implement relevant water quality control plans,

if any have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.

- (b) A regional board, in prescribing requirements, need not authorize the utilization of the full waste assimilation capacities of the receiving waters.
- (c) The requirements may contain a time schedule, subject to revision in the discretion of the board.
- (d) The board may prescribe requirements although no discharge report has been filed.

- (e) Upon application by any affected person or on its own motion, the regional board may review and revise requirements. All requirements shall be reviewed periodically.
- (f) The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of such notice, the person so notified shall provide adequate means to meet such requirements.
- (g) No discharge of waste into the waters of the state, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste

into waters of the state
are privileges, not rights.

Thus the notice requirement is that the regional board must notify the dischargers of waste in writing. This was precisely what occurred in this case. The written requirement would clearly notify persons involved. See Morshead v. California Regional Water Quality Control Board, 45 Cal.App.3d 442 (1975) where written notices sent to interested parties by the water board were found to be proper.

D

THE SECTION IS NOT VOID FOR
FAILURE TO PROVIDE FOR NOTICE
OF ANY OTHER DETERMINATIONS

Appellant does not clearly specify what "Other Determinations" are meant. Thus, Appellee cannot respond to this point inasmuch as it is not clear what alleged defects are challenged.

E

THE SECTION IS NOT VOID FOR
FAILURE TO PROVIDE A HEARING
TO PERSONS NOT IN AGREEMENT
WITH DECISIONS OF THE AGENCY

California Water Code Section 13320
permits an aggrieved person to petition
the state board to review their action
and present relevant evidence on the
matter:

- (a) Within 30 days of any action
or failure to act by a regional
board under subdivision (c) of
§ 13225, Article 4 (commencing
with § 13260) of Chapter 4 of
this division, Chapter 5 (com-
mencing with § 13300) of this
division, Chapter 5.5 (commenc-
ing with § 13370) of this divi-
sion, Chapter 7 (commencing
with § 13500) of this division,
or Division 7.5 (commencing
with § 14000), any aggrieved
person may petition the state

board to review such action or
failure to act. In case of
failure to act, the 30-day
period shall commence upon
refusal of the board to act, or
60 days after request has been
made to the board to act. The
state board may, on its own mo-
tion, at any time review such
action or failure to act and
also any failure to act under
Article 3 (commencing with
Section 13240) of Chapter 4
of this division.

- (b) The evidence before the state
board shall consist of (i) the
record before the regional
board, and (ii) any other
relevant evidence which, in
the judgment of the state board,
should be considered to effec-
tuate and implement the policies
of this division.

- (c) The state board may find the regional board action or inaction to be appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may: (1) direct that the appropriate action be taken by the regional board, (2) refer the matter to any other state agency having jurisdiction, (3) take the appropriate action itself, or (4) any combination of the foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division.
- (d) In the event a waste discharge in one region affects the

waters in another region and there is any disagreement between the regional boards involved as to the requirements which should be established, either regional board may submit the disagreement to the state board which shall determine the applicable requirements.

California Water Code Section 13330 allows an aggrieved person to file a petition for a writ of mandate in the Superior Court to review the decision of the administrative agency.

Section (a) of California Water Code Section 13330 states that "the failure to file such an action shall not preclude a person from challenging the validity of the decision in any judicial proceedings brought to enforce such an order".

Thus an aggrieved person may use

either a writ of mandate or challenge in a criminal proceeding the validity of the decision of the water board or use both methods. This two-fold route to review the board's determination provides an adequate method to persons who disagree with the decisions of the board.

- California Water Code Section 13330 states:

- (a) "Within 30 days after service of a copy of a decision and order issued by the state board under Section 13320, any aggrieved party may file with the superior court a petition for a writ of mandate for review thereof. Failure to file such an action shall not preclude a party from challenging the reasonableness and validity of a decision or order of a regional board or the state board in any judicial

proceedings brought to enforce such decision or order or for other civil remedies.

- (b) The evidence before the court shall consist of the record before the state board, including the regional board's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of this division. In every such case, the court shall exercise its independent judgment on the evidence.
- (c) Except as otherwise provided herein, the provisions of subdivisions (e) and (f) of Section 1094.5 of the Code of Civil Procedure shall govern proceedings pursuant to this section."

F

THE STATUTORY SECTION IS NOT
UNCERTAIN, INDEFINITE, OVER-
BROAD, VAGUE AND SUBJECT TO
ARBITRARY INTERPRETATION.

Appellant does not specify in particular these alleged defects in the statutory section. 'Waste' is clearly defined in California Water Code Section 13050(d). California Water Code Section 13260 (a) - (e) clearly defines 'discharging or proposing to discharge waste' and the reporting requirements. The conduct proscribed is clear to a person of common intelligence. The fee schedule in Section 13260(d) of the California Water Code is found in Title 23, Section 2200 of the California Administrative Code. The statutory section therefore does not suffer from any of the defects alleged.

III

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the case by the Appellate Department of the Superior Court of the State of California, County of Riverside.

Respectfully submitted,

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